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THEORIES OF LAW *

By Professor Roscoe Pound.

*The Two Ideas of Law.*¹

A developed body of law is made up of two chief elements, the enacted or imperative element and the traditional or habitual element. The former is the modern element, and so far as the form of the law is concerned it is tending to become predominant. The latter is the older or historical element, upon which juristic development of the law proceeds by analogy. In the process of time legislation becomes absorbed in this element of the legal system and the enacted rule becomes a traditional principle.² Accordingly there is a gradual transformation of the first element into the second. On the other hand, as the traditional element is developed by judicial experience and juristic science and its principles are worked out into detailed rules, these rules are given imperative form by legislation, so that there is a gradual transformation of the traditional into the imperative.³ The traditional

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¹ The substance of this paper will appear in a forthcoming book, to be entitled "Sociological Jurisprudence." The general idea which it presents and some part of the argument was set forth in a paper entitled "A New School of Jurists," Nebraska University Studies, IV, 249 (1904).

² For instance, English statutes prior to colonization, and to some extent those prior to the Revolution, are part of our American common law in the form in which they were "construed" at the Revolution. *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis., 111. The older statutes are part of the common law as they were worked into it by Coke. In the same way some American statutes which obtain in many jurisdictions, and hence have become the subject of commentary, are becoming part of the common law, *e. g.* homestead and exemption laws in the Western States, and to some extent the federal mining statutes. The Statute of Frauds and the Statute of Limitations are conspicuous examples of statutes that have taken their place in the body of the common law. Compare a like phenomenon in Roman law: "As for the statutory enactments of the republic and the senatus consults of the early empire, these had long ceased to be referred to as authoritative monuments of legislation; they were recognized only in the form in which they had been embodied in the writings of the juris-consults, and were regarded as part of the *ius*, or jurisprudential law rather than of the *leges* or statute law." Muirhead, *Historical Introduction to the Private Law of Rome*, §84 (2 ed., p. 378).

³ Examples may be seen in the English Bills of Exchange Act and Sales of Goods Act, and in the Negotiable Instruments Law, Uniform Sales Act and the like in the United States.

element rests at first upon the usage and practice of tribunals or the usage and customary modes of advising litigants on the part of those upon whom tribunals rely for guidance.⁴ Later it comes to rest upon juristic science and the habitual modes of thought of a learned profession. Thus the basis of its authority comes to be reason and conformity to ideals of right.⁵ On the other hand the imperative element rests upon enactment; upon the expressed will of the sovereign. The basis of its authority is the power of the state.⁶ In consequence of these two elements of developed legal systems and of the different bases upon which their authority rests, two distinct ideas of law are to be found throughout the history of juristic science. Corresponding to these ideas and corresponding to the two elements in the law, two distinct words, originally expressing two distinct ideas, are to be found in most languages spoken by peoples among whom law has reached any great development. The one set of words (*ius, Recht, droit, diritto, derecho*) has particular reference to the idea of right and justice. The leading notion in this set of words is ethical. Hence these words have three meanings. First they mean *right*, that which accords with our ethical ideas. Second they mean *a right*, moral or legal, that is a capacity which the moral sense of the community or the power of the State confers in order to bring about right.⁷ Third they come to mean law; that is a system of principles or body of rules designed to enforce rights and bring about right. In other words, each of this set of words means primarily right and refers to the idea of right and justice, but

⁴ The *interpretatio* of the *ius civile* during the Roman republic may be instanced. Dig. I, 2, 2, §§5, 6. See Voight, *Das Ius Naturale, Aequum et Bonum und Ius Gentium der Römer*, III, 287 ff., where many examples are collected.

⁵ "For reason is the life of the law, nay the common law itselfe is nothing else but reason." Co. Lit. 97 b. "The common law is the absolute perfection of reason; for nothing that is contrary to reason is consonant to law." Wood, *Institute of the Laws of England*, Introduction (1722). "The word law is used in many senses. One sense is when that which is always equitable and just is called law, as for instance, natural law." Paul in Dig. I, 1, 11, pr. This phase of law is the one looked at by the historical and the philosophical jurists.

⁶ Cf. the dictum of Hobbes that authority, not truth makes the law. *English Works*, II, 185; VI, 26.

⁷ In German a *right* is *subjektives Recht*, law (right) is *objektives Recht*. See Schuppe, *Der Begriff des subjektiven Rechts*, §1; Arndts, *Juristische Encyklopädie*, §§10-11.

is used to mean law in general. It is appropriate to periods of legal history in which law is formative or is expanding and developing through juridical speculation or some other non-imperative agency. The other set of words (*lex*, *Gesetz*, *loi*, *legge*, *ley*) refers primarily to that which is enacted or set authoritatively, but tends to mean law as a whole. It is appropriate to periods of enacted law and to periods of legal history in which the growing-point of law is in legislation. As now one and now the other of the elements of which law is made up has prevailed, now one and now the other name has come to be used for the whole. The classical period of Roman law was marked by juristic rather than by legislative activity, and the classical period of the modern Roman law was similarly characterized. Hence the predominance of *ius* and its equivalents in the languages of Continental Europe. On the other hand in England, where a strong central authority took the administration of justice in hand from an early period and the executive legislation of the royal writs created a vigorous system, which attained fixity before juristic speculation was sufficiently advanced to exert an influence, *law*, a word of the second type,⁸ became the general term, and *right* never acquired more than an ethical signification.

A similar double series is to be observed in the formulas in which jurists have expressed their conceptions of law. The two sets of words of which *ius* and *lex* respectively are the types represent two ideas between which definitions of law have oscillated according to the circumstances of legal systems and the agencies through which their rules have been expressed for the time being. *Greek and Roman Definitions.*

As the definition of law has been the battle ground of jurisprudence, there is no way in which the history of the conception of law may be set forth more strikingly or more concisely than by examining the formulas by which jurists have attempted to express their conceptions and set forth their conclusions. In a sense the first formulas we should consider in such an examination are Roman, for "in the history of the world the Romans realized the idea of law first and in a peculiar degree."⁹ But the first Roman definitions of law are founded upon Greek origi-

⁸ Etymologically, however, it is of the first type. Clark, *Practical Jurisprudence*, 67-70.

⁹ Stahl, *Philosophie des Rechts*, I, §96.

nals. Hence we may well begin by looking at Greek law and Greek definitions of law as determined thereby.

Greek law was built upon the small body of institutions common to Aryan peoples. The Greeks developed this body of institutions in such a way as to get from the stage of primitive law into the stage of strict law,¹⁰ but no further except as in Athens the wide discretionary power of the popular tribunals introduced a certain crude equity.¹¹ Accordingly Greek law developed three successive forms. The first was the primitive form of decisions of the king, regarded as divinely inspired.¹² In its second form, law was a tradition of an oligarchy. From a priestly tradition, it became a tradition known only to a class, a body of customary rules of decision possessed as a class tradition by an oligarchy.¹³ The third form was brought about by popular demand for publication of the law, which resulted in a body of enacted law. At first this was no more than declaratory. From publication of established custom, however, it was an easy step to publication of changes as if they were the established custom, and thence to conscious and avowed changes by legislation. Solon's laws mark this stage of true legislation at Athens, just as Alfred's dooms do in Anglo-Saxon law.¹⁴ Hence after Solon,

¹⁰ I take the stages of legal development to be (1) primitive law, the beginning of law, (2) the strict law, (3) the stage of equity or natural law, (4) the maturity of law.

¹¹ Kohler brings this out well, comparing Greek law and Anglo-American law with Roman law and modern German law. Geleitwort to Rogge, *Methodologische Vorstudien zu einer Kritik des Rechts*, p. iii. See also Aristotle, *Politics*, III, 16.

¹² Hirzel, *Themis, Dike und Verwandtes*, 1-56; Maine, *Ancient Law*, chap. 1.

¹³ Maine, *Ancient Law*, chap. 1; Leist, *Graeco-Italische Rechtsgeschichte*, §§63 ff.

¹⁴ Leist, *Graeco-Italische Rechtsgeschichte*, §§70 ff., particularly 76. Leist cites upon this point Plutarch's story of Solon, who, being asked if he had given the Athenians the best laws, answered, "Yes, the best they would accept." Solon, chap. 15. Compare the prologue to Alfred's Laws: "I, then, Alfred, king, gathered these together and commanded many of those to be written which our forefathers held, those which seemed to me good: and many of those which seemed to me not good, I rejected them by the counsel of my *witan* and in other wise commanded them to be holden, for I durst not venture to set down in writing much of my own." Thorpe's transl., *Ancient Laws and Institutes of England*, I, 59.

the law of Athens purported to be a conscious product of human wisdom. But philosophers had begun to inquire as to the relation of laws so constituted to the ideas of right and wrong. Was an act right, they asked, because it conformed to law, or were both the act and the law right if and in so far as they coincided with an absolute and eternal standard above the law?¹⁵ One answer was that what corresponded to the latter standard was natural right, but what corresponded only with the humanly-imposed legal standard was conventional right, while others held that justice rested upon enactment rather than upon nature.¹⁶ Thus we have two ideas in Greek thought concerning law; on the one hand the idea of law as human wisdom, ascertained and promulgated through the State, on the other hand the idea of law as the manifestation of an immutable and eternal right and justice. In other words, the idea of *lex* and the idea of *ius*. This double aspect of Greek thinking about law is due to the circumstance that Greek law in the classical period was in form a body of enactment, but was about to grow by development through philosophical speculation. Greek jurists, however, did not arise to develop the law in this way. Instead Roman jurists put the ideas of the Greek philosophers into practical effect.¹⁷

Greek definitions of law, accordingly, are sometimes definitions of enacted law,¹⁸ sometimes attempts to formulate the rational or

¹⁵ Compare Socrates in Xenophon, *Memorabilia*, IV, 5-15 (*e. g.* IV, 12, "for I say that which is legal is just"), with Aristotle, *Nicomachean Ethics*, V, 7, 1: "Of the politically just, one part is natural and the other legal. The natural is that which everywhere is equally valid, and does not depend on being or not being received. But the legal is what originally was indifferent, but having been enacted, is so no longer."

¹⁶ Aristotle, *Rhetoric*, I, 10-15, *Nicomachean Ethics*, V, 14. Also the Stoic doctrine as stated by Diogenes Laertius, vii, 128: "They say that the just exists by nature and not by enactment." On the other hand, Aristippus, quoted by Diogenes Laertius, ii, 93: "That nothing is just or good or base by nature, but by law and convention."

¹⁷ See Zeller, *History of Eclecticisim in Greek Philosophy* (Alleyne's transl.), 14 ff.

¹⁸ "What the ruling part of the State enacts after considering what ought to be done, is called law." Xenophon, *Memorabilia*, I, 2, §43. "Law is a definite statement according to a common agreement of the State, giving warning how everything ought to be done." Anaxamines, quoted by Aristotle, *Rhetoric* to Alexander, I. These definitions should be compared with the formulas of recent writers in a period of legislation.

philosophical basis of law resting on the authority of intrinsic reason or conformity to an absolute ideal,¹⁹ sometimes combinations of the two.²⁰

The first attempts at a formula which have come to us from a Roman jurist or philosopher are to be found in the writings of Cicero. Cicero lived in a transition period, that of the *ius gentium*, after the strict formal law set down in the Twelve Tables had been modified profoundly by the praetor's edict, but before the period of the great jurisconsults. A period of enacted law had come to an end. A period of juristic speculation was beginning. His formulas, accordingly, savor of each. His essay, *De Legibus*, purporting to contain the discourse of a jurisconsult asked to expound his views of the *ius civile*,²¹ is in name a dialogue on the *rules of law*, and he defines not *ius* but *lex*. Yet he does not use *lex* in the stricter sense of a statute or enacted rule, as in Capito's well-known formula in the next generation,²² but gives it the wider meaning of law. His formulas are doubtless drawn from or modeled upon Greek originals. Nevertheless it is noteworthy that, as he puts them, they have something of the idea of authority and command, appropriate to the period just

¹⁹ "The common law, going through all things, which is the same with Zeus who administers the whole universe." Chrysippus, quoted by Diogenes Laertius, vii, 88.

²⁰ "This is law, which all men ought to obey for many reasons, and chiefly because every law is both a discovery and a gift of God and a teaching of wise men, and a setting right of wrongs, intended and not intended; but also a common agreement of the State, according to which everyone in the State ought to live." Demosthenes, Against Aristogaton, 774, quoted also by Marcian, Dig. I, 3, 2. Notice the three ideas in this passage, (1) law as the imperative of the State, (2) law as a decision of wise men, (3) law as a discovery of the eternally just. Of course Athenian dikasts, like Anglo-American jurors, liked to make the law for the case in hand. Hence Demosthenes, as many modern advocates do, felt the need of exhorting them to stand by the law and of showing them why they should do so. Cf. Aristotle's advice to the advocate on this point, Rhetoric, I, 15. Yet the combination of the two ideas, at a time when philosophy was inquiring as to the basis of the authority of enacted rules, is noteworthy.

²¹ *De Legibus*, i, 4.

²² "A *lex* is a general command of the people or of the *plebs*, upon question by the magistrate." Aulus Gellius, X, 20, 2.

past, and something of the idea of reason and justice, appropriate to the period just beginning.²³

Passing to the classical jurists in the golden age of juristic law-making, we find the idea of authority and command has disappeared, and reason and justice, to which the jurists of the time were striving to make the actual rules of law conform, alone are insisted upon. Thus Celsus, at the beginning of the second century A. D., and Ulpian following him, define law (*ius*) as "the art of what is right and equitable,"²⁴ and the latter defines jurisprudence as the science of the just and the unjust.²⁵ Paul in like manner says law (*ius*) is "that which is always equitable and right."²⁶ By the middle of the third century, however, the period of the classical jurists is past. Rescripts of the emperor supplant *responsa* of the jurisconsults as the source of private law, and by the end of the fourth century these rescripts cease to be authoritative except for those to whom addressed. From the time of Diocletian (A. D. 284) imperial legislation becomes the growing point of the law. This period has left no juridical or philosophical treatise to set forth the current notion of law. But it can hardly be an accident that the word *lex* began to mean law in general during the period of legislation and codification from Diocletian to Justinian.²⁷ An antiquarian revival in the reign of Justinian preserved the formulas of the classical jurists. But the Institutes and Digest give us the legal speculation of the second century, not of the sixth. The ideas of an age when Roman law was known as a body of enactments are well-illustrated by the

²³ "Law (*lex*) is the right reason of commanding and prohibiting." De Legibus, i, 5. "Law (*lex*) is the highest reason, implanted in nature, which commands what ought to be done and prohibits the contrary." De Legibus, i, 6. "A just sanction, commanding what is upright and prohibiting the contrary." Philipp. xi, 12.

²⁴ *Ars aequi et boni*. Dig. I, 1, 1, §1.

²⁵ Dig. I, 1, 10, §2.

²⁶ Dig. I, 1, 11, pr.

²⁷ Savigny, Geschichte des römischen Rechts im Mittelalter, I, §37. The first case of its use in this sense is in the *Lex Dei, sine Mosaicarum et Romanarum Legum Collatio*, dating from the end of the fourth century. In this connection it is interesting to note that while *droit*, *diritto*, *derecho*, all meaning etymologically that which is straight or right, are equivalents of *ius* and are generic terms, and *loi*, *legge*, *ley*, equivalents of *lex*, are properly employed to mean enactment, legislation or rule, yet *loi*, *legge*, *ley*, for the same reasons that led to the wider meaning of *lex*, are more and more used in the wider sense.

definitions in the treatise of Isidore of Seville (died 636) on the etymology of words. He says:

"*Fas* is divine law (*lex*), *ius* is human law. *Lex* is a written enactment. Custom is usage approved by time or unwritten law (*lex*). . . . Usage, moreover, is a certain kind of law (*lex*) instituted by observance, which is held for enactment (*lex*), when enacted law is wanting."²⁸

In other words, enacted law is the normal type; customary law is a makeshift to which men resort when the former fails them.²⁹ This view is even more apparent in the writings of the period prior to the rise of the school at Bologna. Although the classical formulas for *ius* are repeated, they have become empty. *Lex* is the living word, and enactment is obviously felt to be the true law.³⁰

Development of the Conception and Definition of Law from the Revival of Legal Study at Bologna to the Time of Grotius.

In tracing the growth of the conception of law from the revival of legal studies at Bologna in the twelfth century to the time of Grotius, we must bear in mind that the theories of the time "implied the acceptance of three great authorities, which might be interpreted or applied, but were not to be questioned,—the authority of the Bible, of Aristotle, and of Justinian."³¹ The *Corpus Iuris Civilis*, as legislation of the Emperor Justinian, was supposed to be binding statute law, and was properly to be designated *lex*. In this belief, jurists were engaged in interpreting and commenting upon the authoritative text, so as to fit it to the

²⁸ Bruns, *Fontes Iuris Romani Antiqui*, (6 ed.,) II, 83.

²⁹ This was a point to be insisted upon in the period of the *Leges Barbarorum*. Thus in a capitulary of 793 we read: "When law (*lex*) is wanting, let custom prevail, and let no custom be put over the law." Capitulary of Pippin, King of Italy, xxiii, Walter, *Corpus Iuris Germanici Antiqui*, II, 286.

³⁰ For example, in the *Expositio Terminorum* appended to the Eleventh-Century *Patri Exceptiones Legum Romanorum*, after the well-known formula of Celsus, we read: "Law (*lex*) is right (*ius*) enacted by wise princes." Compare with this, Gaius, I, 2: "Moreover laws (*iura*) consist of statutes (*leges*)," etc. Also in the related *Libellus de Verbis Legalibus*: "But all law (*ius*) consists of statutes and customs. Statute (*lex*) is the enactment of princes written for the common good; custom is unwritten enactment (*lex*)." Fitting, *Juristische Schriften des fruheren Mittelalters*, 164, 181. The absence of any real line between *ius* and *lex*, so far as the former has more than an ethical meaning, is noteworthy.

³¹ Ritchie, *Natural Rights*, 7.

conditions of the modern world. As the reception of Roman law proceeded, the law in Continental Europe was made up of the *Corpus Juris* with its modern gloss,—which, together with the legislation of contemporary sovereigns, was regarded as enacted law,—and the customary law of the various peoples, as it had developed prior to the revival or reception of the Roman law. Hence Gratian (about 1150), instead of drawing upon the classical definitions of *ius*, turns to the formulas of Isidore, already quoted, and tells us, substantially in the latter's very words, that all *ius* consists of enactments and customs; that *lex* is a written enactment; and that custom is a certain kind of *ius* which is taken for *lex* when enacted law is wanting.³² For him, too, enacted law was the normal type, and customary law a mere makeshift to which men resorted for want of enactment in order to prevent failure of justice.

During this period English judges were constructing the common law of England by developing a judge-made customary law through interpretation and analogical extension of writs and precedents. English law was *ius*, not *lex*, although the powerful central authority behind it gave it the strength of imperative law and obscured the ethical and logical element, usually so prominent in non-legislative systems. But the title *De Legibus et Consuetudinibus*, borne both by Glanvill's treatise and by Bracton's, makes it evident that the Continental ideas as to the nature of law were taken for granted. Indeed, Glanvill (about 1189) feels compelled to consider whether England has laws in view of the circumstance that the rules administered by the king's judges are not enacted.³³

The beginning of the movement back to the classical theory of law is to be seen in the next century, when St. Thomas Aquinas (1225 or 1227-1274) formulates a theory which, in one way or another, has been felt in jurisprudence until very recent times. The Germanic principle that the state was bound to act by law

³² Canons 2-5, dist. I.

³³ "For the English laws, although not written, may as it should seem, and that without any absurdity, be termed laws (since this itself is a law—that which pleases the prince has the force of law). . . . For if from the mere want of writing only they should not be considered as laws, then unquestionably writing would seem to confer more authority upon laws themselves than either the equity of the persons constituting or the reason of those framing them." *De Legibus et Consuetudinibus Regni Angliae*, Preface (Beames' transl., xi).

coming in contact with the revived classical idea that the state exists of natural necessity for the general welfare, toward which law is but a means, so that the state creates law instead of merely recognizing it, led men to take up once more the distinction of natural law and positive law.³⁴ Positive law was the creature of the sovereign. But all sovereigns were subject to natural law, and their enactments in conflict therewith were simply void. Thomas Aquinas made over this philosophical theory to bring it into accord with theology. He divided the old *ius naturale* into two parts,—a *lex aeterna* and a *lex naturalis*,—of which the one is the “reason of the divine wisdom” governing the whole universe,³⁵ the other the law of human nature, proceeding ultimately from God but immediately from human reason, and governing the actions of men only. Man, he held, being a rational creature, participates in the eternal reason, so that the *must* which the *lex aeterna* addresses to the rest of creation is *ought* to him. Thus that part of the eternal law which man’s reason reveals is to be called natural law.³⁶ While this scheme made law a body of enactments of the supreme law-giver of the universe, and so properly to be called *lex*, it took from positive law its character of enactment and made it a mere recognition of the *lex naturalis*, which was above all human authority.³⁷ Hence it prepared the way for the more liberal notions of the Humanist School of jurists and for the return in the seventeenth century to the classical conception of reasonableness as the source of authority in law. The influence of this theological-philosophical system of jurisprudence outlined by Thomas Aquinas may be seen in the formulas of practical lawyers down to the Reformation. Thus, Fortescue (between 1453 and 1471), after defining *ius* in the words of the Digest, defines *lex*, used in the sense of positive law, as “a holy sanction (*sanctio sancta*) commanding what is right and forbidding the contrary,”³⁸—that is, a sanction added by the state to a

³⁴ Gierke, *Political Theories of the Middle Age* (Maitland’s transl.), 73, 74.

³⁵ *Summa Theologiae*, 1, 2, qu. 93, art. 1.

³⁶ *Summa Theologiae*, 1, 2, qu. 91, art. 2.

³⁷ His definition of a law (*lex*) is: “A certain ordinance of reason for the common good promulgated by him who has the care of the community.” *Summa Theologiae*, 1, 2, qu. 90, art. 4.

³⁸ *De Laudibus Legum Angliae*, cap. 3. This goes back to Cicero (*sanctio iusta, iubens honesta et prohibens contraria*, Philipp. xi, 12.) But

rule of natural law. As this natural law, however, was discoverable by reason, the obvious effect of the doctrine was to require all rules of positive law to be tested by reason, and accordingly we find in *Doctor and Student* (before 1523) the significant statement that the law of nature "is called by them that be learned in the law of England the *law of reason*."³⁹ Compare also the formula of Suarez:

"Law (*lex*) is a common precept, just and stable, sufficiently promulgated."⁴⁰

An example of this theory in action may be seen in an argument of R. Suparez, in discussing the interpretation of a text of the Roman law:

"A law of nature is a rule of reason. Wherefore a human law partakes of the reason of law in so far as it is derived from a law of nature. And if they disagree in anything, there is no law, but a corruption of law."⁴¹

Development of the Conception and Definition of Law from Grotius to Kant.

Here, as in the case of the theory of justice, a wholly new period begins with the great work of Grotius (1625). Although, perhaps, he did no more than give currency to what the expositors of natural law had worked out already,⁴² the result of his book was to emancipate jurisprudence from theology.⁴³ Soon after-

the choice of this formula and the pious turn given it are significant. Compare Bracton, I, 3, where the Digest is followed very closely and *ius* is defined.

³⁹ "The first is the law eternal. The second is the law of nature of reasonable creatures, the which, as I have heard say, is called by them that be learned in the law of England, the law of reason." *Doctor and Student*, Introduction. "And this law is raised upon six principal foundations. 1. Upon the law of nature, though we seldom make use of the terms, the law of nature: but we say that such a thing is reasonable or unreasonable or against the law of reason." Wood, *Institute of the Laws of England*, Introduction.

⁴⁰ *De Legibus*, I, 1, cap. 12 (1619).

⁴¹ *Repetitiones*, 272-3 (1558).

⁴² Hinrichs, *Geschichte der Rechts und Staatsprincipien seit der Reformation*, I, 59.

⁴³ "And, indeed, what we have already said about natural law would have a certain weight even if we were to concede, what one cannot concede without the greatest sin, that there is no God or that He gives no care to human concerns." *De Jure Belli et Pacis*, Prolegomena, §11. See Lioy, *Philosophy of Right* (Hastie's transl.) I, 113.

ward Herman Conring, the founder of the Germanist School and in a sense the founder of modern legal history, in his great work, *De Origine Iuris Germanici* (1643), overthrew the notion of the statutory authority of the *Corpus Iuris Civilis* in the modern world.⁴⁴ He proved that the empire then existing was in no sense the empire of Augustus and of Justinian, and that the legislation of Justinian had never had and did not have any statutory authority in Germany. The question then arose, what was the source of its authority? For no one could doubt that it actually obtained in the forum. The only answer could be that it had been received as law and had obtained the force of a customary law administered in the courts by long-standing usage. One might still ask, however, what was the philosophical basis of this reception of Roman law? In answering this question, the seventeenth-century jurist had before him the theory of natural law, the theory that the ultimate criterion of the validity of legal rules, the test by which all legal rules must be tried, was conformity to natural law. Moreover, as we have seen, Grotius had substituted a philosophical natural law for the theological natural law of his predecessors. Instead of being based on authority, natural law was regarded as founded upon reason. In other words, natural law ceased to be *lex naturalis*, the enactment of a supernatural legislator, and became once more *ius naturale*, the dictates of reason in view of the exigencies of human constitution and of human society.⁴⁵ Accordingly positive law came to be regarded as the application of reason to the civil relations of men, and on the Continent the *Corpus Iuris Civilis* stood as its exponent merely because of its inherent reasonableness. For instance, D'Aguesseau (1653-1751) says:

"The grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason after having ceased to reign by her authority."⁴⁶

⁴⁴ Brunner, *Grundzüge der deutschen Rechtsgeschichte*, §64; Stintzing, *Geschichte der deutschen Rechtswissenschaft*, II, 3.

⁴⁵ Accordingly, where the sixteenth-century jurist began with a theological disquisition, the seventeenth and eighteenth-century jurist begins with a discussion of the nature of man and the nature of human society. See Pufendorf, *De Jure Naturali et Gentium*, bk. I, chaps. 1-2; Burlamaqui, *Principles of Natural and Politic Law* (Nugent's transl.), I, pt. 1, chaps. 1-2; Wooddesson, *Elements of Jurisprudence*, Lect. I (Of the Laws of Man's Nature); Wilson, *Law Lectures*, chaps. 6-9.

⁴⁶ Transl. by Kent, *Commentaries*, I, 516.

Grotius brings out the new idea of law in his formula :

"A rule of moral actions obliging to that which is right."⁴⁷

It should be noticed, in the first place, that Grotius does not define *lex*, but instead defines *ius*. From his time forward Continental jurists, when referring to law in general, use *ius* or its equivalent in the modern languages. In the next place, the words "obliging to that which is right" should be noticed. The obligation involved in law is regarded as existing only to the extent that the result is ethical. In other words, it is not the authority behind the rule which, according to this theory, makes it law, but the result reached by the rule. Perhaps this statement gives Grotius and his successors credit for a more teleological view than they consciously entertained. In that event, it would be more correct to state their doctrine thus: A rule is not law and is not obligatory because of any physical authority behind it, but because it coincides and to the extent that it coincides with the rule of natural law, of which it purports to be an ascertainment, which rule is a rule of right and justice to be reached through reason. The authority of legal rules, in this view, rests on inherent reasonableness. Finally the obligation of a rule of law and the obligation of a moral rule, in this view, are essentially the same. In each case there is an obligation resting upon reason, in that reason shows us the dictates of right and justice.

Two important consequences flowed from the foregoing theories. The part they played in the founding and development of international law is well known.⁴⁸ Much as it has been criticized, this confusion of what ought to be with what is has borne the brunt of making and developing international law.⁴⁹ In practice, these theories gave rise to a movement which is entirely comparable to the classical period in Roman law, to a period in which the growing-point of law was to be found in juristic speculation under the influence of a philosophical theory. Until the rise of legislation upon the Continent, consequent upon the making over of the law by the jurists of this period, the philosophical theory held the field in jurisprudence. The idea which was at work in legal theory and in practice cannot be stated more clearly than in the formula given by Montesquieu (1748): "Law in general is

⁴⁷ De Jure Belli et Pacis, I, 1, §4.

⁴⁸ See Maine, International Law, Lect. I.

⁴⁹ See The Paquette Habana, 175 U. S. 677.

human reason.”⁵⁰ The great text-writers of the seventeenth and eighteenth centuries drew their theories directly or indirectly from Grotius. But these same civilians furnished a large part of the inspiration and also of the juristic principles upon which writers upon law of the first half of the nineteenth century proceed in England and in America. Thus the absolute idea of law, which prevails so largely in America, comes from Grotius in two ways. On the one hand it comes through Blackstone and on the other hand it comes through American publicists in the eighteenth and nineteenth centuries, who followed the Dutch and French publicists and civilians.⁵¹

A consequence of the theories of the Law-of-Nature School was a movement for legislation. Natural law was regarded as a body of eternal principles, applicable to all men, at all times, under all circumstances. It was believed that this body of principles as a complete whole might be discovered by human reason. Hence men conceived that it was not merely their duty to criticize existing rules with reference to these principles. Even more, they came to hold, it was a duty to work out completely all the applications of these eternal principles and put them in the form of a code. Accordingly about the middle of the eighteenth century a strong movement for codification set in,⁵² the most important fruit of which was the French code of 1804, which served as the foundation of nearly all Continental codifications down to the German code, which took effect in 1900. This movement for codification and the influence of an age of absolute governments revived the older conception of law as enactment and brought about a reaction: The reaction begins, indeed, with Hobbes a century earlier. Writing in England where there was an efficient legislature and where the notion of natural law was producing no practical results because no system of foreign law had been received which required to be made over, it was natural that Hobbes should be impressed only with the imperative element.

⁵⁰ *L'esprit des lois*, 1, chap. 3.

⁵¹ Thus in Wilson's *Law Lectures* (1804), Pufendorf is cited 29 times, and there are 11 citations of Montesquieu, 10 of Grotius, 10 of Vattel, 14 of Burlamaqui, 6 of Heineccius, and 5 of Rutherford's *Institutes of Natural Law*, an exposition of Grotius. In the first volume of Story on the Constitution, there are 21 citations of Montesquieu, 19 of Vattel, 6 of Heineccius, 3 of Burlamaqui, 2 of Grotius and 2 of Rutherford.

⁵² See Schuster, the German Civil Code, 12 *Law Quarterly Rev.*, 1, 17.

Probably a stronger reason is to be found in the legislative activity of the Commonwealth, which could not fail to affect his thinking. It must be remembered also that Hobbes conceived of right and justice as having their origin in the State. It followed that there could be no criterion above and beyond the authority of the State by which to judge of the validity of laws. Accordingly, Hobbes says:

"Civil law is to every subject those rules which the commonwealth hath commanded him . . . to make use of for the distinction of right and wrong; that is to say of what is contrary and what is not contrary to rule."⁵³

Until Kant, this insistence on the imperative element becomes more and more marked. After the Reformation and the practical breakdown of the Empire, the national idea was growing, and national law was more and more an obvious fact. Hence writers upon the Continent at the end of the seventeenth century were beginning to use *lex* for the rules of the civil law in each State,⁵⁴ and Daguesseau, writing in 1716, defines law thus:

"The exact notion of the word law includes always the idea of a supreme power which is able to constrain men to submit to it."⁵⁵

This revival of the older conception of law as enactment, as has been said, was furthered in the eighteenth century by the political ideas of a period of absolute governments. In France, Louis XIV, in the latter part of the seventeenth century, had codified Roman-French law to no small extent through royal ordinances.⁵⁶ A period of legislation was at hand, and the effect may be seen in French definitions of law in the eighteenth century. For example, Burlamaqui defines law in this way:

⁵³ *Leviathan*, chap. 26. With Hobbes also there is an ethical end. But the end does not furnish absolute criteria of the validity of rules as with Continental jurists of the School of Natural Law. The nineteenth-century followers of Hobbes, logically enough, leave out all reference to the end.

As to the circumstances affecting Hobbes' conception of law, see Maine, *Early History of Institutions* (American ed.), 365.

⁵⁴ "A law (*lex*) is an enactment by which a superior obliges one subject to him to direct his actions according to the command of the former." Pufendorf, *Elementa Iurisprudentiae Universalis*, Def. 13 (1762).

⁵⁵ But compare his discussion of the doctrine that the civil law cannot derogate from the principles of natural law. *Oeuvres*, XIII, 528. As he says, in view of the politics of the time this was a difficult and dangerous question. *Oeuvres*, XIV, 617 ff.

⁵⁶ See Esmein, *Cours d'histoire du droit Français* (2 ed.), 785.

"A rule prescribed by the sovereign of a society to his subjects."⁵⁷

Likewise Rousseau, seeing in law "the conditions of civil association," and perceiving that these conditions were controlled by a personal sovereign in a highly centralized State, whereas in his view the people were the sole legitimate sovereign, insists upon the imperative element. He says:

"Law is the expression of the general will."⁵⁸

That is, to Rousseau, the law is an expression not of natural law or of eternal principles of right and justice, but simply of the general will. Yet his real point was that the organ of expression of the general will should not be a personal sovereign but instead some form of collective popular action.

Nevertheless the seventeenth-century conception persisted in juristic writing for several reasons. One was that international law occupied men's minds to no small extent, and there legislation and an imperative theory were out of the question.⁵⁹ Again, after all the legislative element in the law of the time, although conspicuous, was by no means the most important. It was not until after the French code of 1804 that the imperative theory obtained the upper hand in French juristic thinking. The development of Roman-French law through juristic writing which culminated in the writings of Pothier was still going on, and was going on under the influence of the idea of natural law.⁶⁰ Hence we find many formulas of the seventeenth-century type in the eighteenth century.⁶¹

⁵⁷ *Principes de droit naturel*, I, 8, 2 (1747). The imperative theory is stated very clearly as to positive law by Wolff, *Institutiones Iuris Naturae et Gentium*, §1068 (1750).

⁵⁸ *Contrat Social*, Liv. II, chap. 6 (1762).

⁵⁹ Almost without exception, the great juristic treatises of this period, e. g. those of Pufendorf, Burlamaqui, Wolff, Vattel, are upon the law of nature and nations.

⁶⁰ A single extract will show the juristic method of the time: "The principles of the Roman laws respecting the different kinds of agreements and the distinction between contracts and simple agreements, not being founded on the law of nature, and being indeed very remote from simplicity, are not admitted into our law." Pothier, *Obligations*, pt. I, chap. 1, §1 (Evans' transl.).

⁶¹ "A rule to which men are obliged to make their moral actions conformable." Rutherford, *Institutes of Natural Law*, chap. 1, §1 (1754). The word "obliged" in this formula is ambiguous. It might suggest obligation through the force of the State employed to give effect to the rule.

Blackstone characteristically attempted to combine the two notions. He attempted to reconcile the current philosophy of law with his common sense as a practical lawyer by the simple process of stating the results to which they led respectively side by side without comment. Accordingly he adapted a Ciceronian formula so as to make it include both of the current conceptions.

"A rule of civil conduct, prescribed by the supreme power in a State, prescribing what is right and prohibiting what is wrong."⁶²

A question arises at once upon this definition. Would Blackstone say that what is prescribed is right because it is prescribed and that what is prohibited is wrong because it is prohibited, or did he mean that it is prescribed because it is right and prohibited because it is wrong, and that prescriptions are only valid because and in so far as they prescribe what is right and prohibitions only valid because and in so far as they prohibit what is wrong? He makes no attempt to choose between these two conflicting ideas which were current in the legal thinking of his time. He states each theory in detail and then frames a definition which will include either without anywhere suggesting their inconsistency. To understand Blackstone's method of dealing with controverted problems, one should compare his statement of the extreme view as to conflict between legislation and natural law⁶³ with his statement as to the omnipotence of Parliament,⁶⁴ his criticism of the

The context shows, however, that this was not the author's idea. He means obliged, not by the force of the State, but by the intrinsic moral force of the rule.

⁶² Commentaries, I, 44 (1765).

⁶³ See Commentaries, I, 41: "This law of nature . . . is of course superior in obligation to any other. It is binding all over the globe in all countries and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately from this original." See also I, 43: "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human law should be suffered to contradict these. There are, it is true, a great number of indifferent points in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of and act in subordination to the former."

⁶⁴ Compare with the foregoing: "The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it

theory of a state of nature⁶⁵ with his scheme of rights founded thereon,⁶⁶ and his curious juxtaposition of utilitarianism and Grotian natural law.⁶⁷ The reasons why Blackstone was unable to choose between the two theories are not far to seek. His situation was not unlike that of Cicero, who, as we have seen, did much the same thing. At the revolution of 1688, Parliament became sovereign in the English polity. No authority thereafter could question the absolute supremacy of Parliament or the absolutely binding force of its enactments upon every Englishman and upon every English tribunal. At the same time the great bulk of English law was traditional rather than imperative in character. The imperative element was hardly noticeable in the private law of the time. In the actual administration of justice, the traditional element held almost the whole field. Moreover, a philosophical theory substantially the same as that which obtained upon the Continent had been set forth by English writers upon law at least since Finch's Law⁶⁸ at the beginning of the seventeenth

cannot be confined, either for causes or persons within any bounds. . . . It hath sovereign and uncontrolled authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, . . . this being the place where that absolute, despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms." I, 160. Also: "It can in short do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is that what the Parliament doth, no authority upon earth can undo." I, 161.

⁶⁵ "Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil. . . . This notion of an actually existing unconnected state of nature is too wild to be seriously admitted." I, 47.

⁶⁶ Compare with the foregoing: "The rights of persons considered in their natural capacities are also of two sorts, absolute and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society, and standing in various relations to each other. By the absolute rights of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." I, 123.

⁶⁷ I, 41.

⁶⁸ Bk. I, chap. 6. "Therefore lawes positive which are directly contrary to the former (the law of reason) lose their force and are no lawes at all. As those which are contrary to the law of nature. Such is that of the Egyptians to turne women to merchandise and commonwealth affaires and men to keepe within dores."

century. The truth is that neither theory exactly met the situation in English law. Each of them stated a part, and an important part, of the truth. Blackstone stated each, therefore, and found it beyond his powers to work out a new theory which should embrace adequately all the phenomena of the legal system of the day.

To sum up, the period from Grotius to Kant is marked by two movements: (1) a juristic movement, proceeding upon the notion that law is reason, in which the ideas of right and justice are made paramount; (2) a legislative movement in which law is thought of as emanating from the sovereign and in consequence the idea of command comes to be paramount. In other words, in the eighteenth century the traditional element, while still important, was beginning to be disturbed by the development of the imperative element. Accordingly jurists of the eighteenth century were not clear as between the two theories and their formulas are the result of the two opposing tendencies in the law of the time.

Development of the Conception and Definition of Law from Kant to Thering.

Nineteenth-century definitions of law are of three types, philosophical, historical, and analytical. The philosophical formulas are of two kinds, formulas written from the standpoint of natural law, persisting from the eighteenth century, which are mostly Rousseauist, and metaphysical formulas, which belong properly to the nineteenth century. The historical formulas are drawn from the philosophical standpoint, and, indeed, usually from a metaphysical standpoint. The analytical formulas are of three types. French formulas after the code of 1804 become wholly legislative. Anglo-American formulas, for obvious reasons, while imperative, insist more and more upon the tribunal rather than upon the legislature as the formulating agency. The German analytical formulas, which have come into existence since the rise of German legislation, are for the most part social-utilitarian because of the influence of the Social-Philosophical School.

A new period in juristic thinking begins with Kant, who, indeed, marks the end of eighteenth-century jurisprudence and the starting-point of the metaphysical and in a sense the historical jurisprudence of the nineteenth century. As has been shown in

another place,⁶⁹ the chief juristic problem for Kant and his successors was the relation of law to liberty. Kant met this problem by working out thoroughly the purely judicial notion of justice, the idea of an equal chance to all exactly as they are, to which the individualism of the time and the insistence upon equality in the maturity of law gave such prominence in the juristic thinking of the new century. His definition of right sets forth his solution of the problem:

"The sum of the circumstances according to which the will of one may be reconciled with the will of another, according to a common rule of freedom."⁷⁰

Savigny turned this formula of right into one of law:

"The rules whereby the invisible boundaries are determined, within which the existence and activity of each individual gain secure and free opportunity."⁷¹

If we adopt an idealistic interpretation of legal history, thinking of the development of law as a gradual unfolding of Kant's idea of right, this formula is a statement of the position of the Historical School. Human experience has gradually discovered how to determine these invisible boundaries and has expressed what it has found in rules of law. Comparing with the two foregoing definitions the formula of a thorough Rousseauist, writing in a country governed by a code and in an age of legislation—

"The aggregate of the rules which provide for the force of society to restrain those who infringe the liberty of others—"⁷²

it becomes apparent how strongly Kant influenced both the Philosophical School that already existed and the Historical School which was to come.

Savigny's school carries forward one of the two ideas which had been contesting in jurisprudence in the seventeenth and eighteenth centuries. The element in law which the medieval jurists had rested on theology, the seventeenth-century jurists had derived from reason and the eighteenth-century Law-of-Nature School had deduced from the nature of man, Savigny sought to discover through history. In effect, therefore, the Historical

⁶⁹ See my paper, *The Scope and Purpose of Sociological Jurisprudence*, 25 *Harvard Law Rev.*, 140, 151-152.

⁷⁰ *Metaphysische Anfangsgründe der Rechtslehre*, Einleitung, §B (1797).

⁷¹ *System des heutigen römischen Rechts*, I, §52 (1840).

⁷² Acollas, *Introduction a l'étude du droit*, 2 (1885).

School and metaphysical type of the Philosophical School were closely akin, each postulating an ideal or natural law, and one seeking to discover it through history, the other to find it through logical development of an abstract idea.⁷³ As the Historical School accepted the idealistic interpretation of history, jurisprudence appeared to have two sides: a historical unfolding of the idea of liberty as men discovered the rules by which to realize it, and a logical unfolding of the principles involved in the abstract conception. Partly through the influence of the Historical School and partly because the traditional element was the element of chief importance and the one in which growth was taking place in German law at that time, the Philosophical School lost its bent for legislation. Hence the imperative element plays no part in the formulas of either school prior to Jhering. Moreover, because of the idealistic interpretation of legal history, the best definitions during the hegemony of the German Historical School are philosophical, and for the most part metaphysical.⁷⁴ During this period men were becoming more doubtful of the efficacy of equality as a panacea and the purely judicial idea of justice began to drop out of the formulas of metaphysical jurists. Examples may be seen in the definitions of Krause⁷⁵ and Ahrens.⁷⁶ These

⁷³ "Right, having entered reality in the form of law, and having become an actual fact, stands in independent opposition to the particular will and opinion of right, and has to vindicate itself as a universal." Hegel, *Grundlinien der Philosophie des Rechts*, §219 (1820). Law is "the expression of the idea of right involved in the relations of two or more human beings." Miller, *Philosophy of Law*, 9 (1884).

⁷⁴ For example—"The recognition of the just freedom which manifests itself in persons, in their exertions of will and in their influence upon objects." Puchta, *Cursus der Institutionen*, I, §6 (1841). "An aggregate of rules which determine the mutual relations of men living in a community." Arndts, *Juristische Encyclopädie*, §1 (1850). "The sum of the conditions of social coexistence with regard to the activity of the community and of individuals." Pulszky, *Theory of Law and Civil Society*, 312 (1888). "The sum of moral rules which grant to persons living in a community a certain power over the outside world." (Ledlie's transl.) Sohm, *Institutes of Roman Law*, 4 ed., §7 (1889).

⁷⁵ "The organic whole of the external conditions of life measured by reason." *Abriss des Systemes der Philosophie des Rechtes*, 209 (1828).

⁷⁶ "The rule or standard governing as a whole the conditions for the orderly attainment of whatever is good, or assures good for the individual or society, so far as those conditions depend on voluntary action." *Philosophische Einleitung*, in Holtzendorff, *Encyclopädie der Rechtswissenschaft*, 1 ed. (1871). I have used Sir Frederick Pollock's transl., *Science of Politics*, 46.

definitions are noteworthy also because Krause and Ahrens, while insisting upon the principle of organization, do not notice the imperative idea.

In the United States, publicists and the type of lawyer who did not subscribe to the prevalent historical or analytical ideas, continued the phase of eighteenth-century thought which the Historical School was developing into something better. The reason for this in the case of publicists is obvious, since this eighteenth-century juristic theory is also the classical political theory in America, the theory of the Declaration of Independence and of the Bills of Rights.⁷⁷ Most of the American formulas from this standpoint, however, show the influence of the Historical School, which became very marked after 1870, as American students began to go to Germany in increasing numbers and German ideas took root in our universities.⁷⁸ Others show the influence of the

⁷⁷ A form of this theory persists also in international law. See for example: "Law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power." Oppenheim, *International Law*, I, §5 (1905). At first all juristic thinking in international law was from the standpoint of natural law. Later under the influence of English lawyers, who rejected ideas of natural law, attempt was made to substitute the common consent of nations for the nature of man and of society as the basis of this body of law. See especially what is said in *R. v. Keyn*, 2 Ex. Div., 63. In other words, they attempted to replace a philosophical theory with a political theory. But the "consent" here is as much a fiction as the "agreement" in the third definition in the next note. A nation would hardly be allowed to say that it had not consented to what all other nations consider a rule of right and justice, and consequently of international law, any more than an individual would be permitted to put the theory of consent of the governed into actual effect in the courts.

⁷⁸ Some examples may be considered. "Those rules of intercourse between men which are deduced from their rights and moral claims; the expression of the jural and moral relations of men to one another." Woolsey, *International Law*, §3 (1871). The first half of this is pure natural law. The second half shows the influence of the Historical School, and is to be compared with some of the formulas of the metaphysical jurists, *e. g.* Miller's *ante*, note 73.

Again: "The aggregate of received principles of justice." Smith, *Elements of Right and of the Law*, §231 (1887). The phrase "received principles of justice" suggests two questions. One is, how received? It is not clear that the author does not mean, received by legislation. In that event we have the Grotian idea, which was handed down by Blackstone. If, on the other hand, he means, received by a course of historical development, the Historical School would agree. But notice, secondly,

this line. The significant achievements of nineteenth-century theory of law were in historical and analytical jurisprudence.

Note has been made already of the influence of the metaphysical type of the Philosophical School upon the earlier formulas of the historical jurists. In their later formulas, the influence of the Analytical School is no less marked. Three definitions will suffice for our purpose:

"The sum of the rules which fix the relations of men living in society,—or at least of the rules which are sanctioned by the society,—imposed upon the individual by a social constraint."⁸⁰

"The rule of conduct to which a society gives effect in respect to the behavior of its subjects toward others and toward itself and in respect to the forms of its activity."⁸¹

"A rule expressing the relations of human conduct conceived as subject to realization by state force."⁸²

that the principle received must be one of justice or, according to this formula, it is not law. In other words, this definition attempts a combination of the eighteenth-century view with the view of the Historical School, as we have seen others attempting to combine the law-of-nature idea with the imperative idea.

Another definition shows markedly the Rousseauist and also the Puritan ideas of American lawyers: "A rule agreed upon by the people regulating the rights and duties of persons." Andrews, *American Law*, §72 (1900). Of course this "agreement of the people" is a fiction, unless agreement is used in a very broad sense indeed. In truth this agreement and Austin's command of the sovereign are the same. Each exists as to the traditional element of the legal system by implication only. The one author looks to an ultimate moral source, the other to the immediate practical source of the sanction upon which both have fixed their attention. Analytical School.⁷⁹ But no real advance was possible along

⁷⁹ For example: "The will of the State concerning the civic conduct of those under its authority." Woodrow Wilson, *The State*, §1415 (1898). The idea of will here is perhaps a reminiscence of Rousseau. But the definition strongly suggests the analytical position in asserting that the traditional element in our law is law through the will of the State. In a sense this is true, as we shall see when we come to the same problem in connection with Austin's formula. But in a deeper sense it is not true. Often the traditional element in law is imposed on the State through the habitual modes of thought of the legal profession and of jurists. The history of practice acts in nearly all American jurisdictions has shown that it is impossible for the will of the State, as expressed through its organs of legislation, to make headway rapidly or even consistently against a settled juristic tradition.

⁸⁰ Brissaud, *Manuel d'histoire du droit Français*, 3 (1898).

⁸¹ Merkel, in Holtzendorff, *Encyklopädie der Rechtswissenschaft*, 5 ed., 5 (1890).

⁸² Wigmore, *Cases on Torts*, 11, app. A, §3 (1911).

The prominence given to the imperative element in each case, directly or indirectly, should be observed. In this respect these formulas should be compared with Savigny's definition.⁸³ In the latter there is no suggestion of any imperative. There the rules of law are thought of as determinations of the bounds of individual activity resulting from human experience, not as rules proceeding from the will of the State or deriving their significance from force or constraint. Savigny thought of rules of law as analogous to rules of language. In each case, he would say, we practise them rather than enforce them. In contrast with this, the more recent formulas of historical jurists insist upon sanction through society or through the State as a social organization. The reason for this influence of the analytical conception upon the historical conception is not far to seek. To speak only of the three formulas cited, Brissaud wrote in a country governed by a code, where, as we shall see presently, almost all jurists were writing definitions from the imperative standpoint. Merkel wrote after the rise of legislation in Germany and after Jhering had given an analytical turn to German juristic thought. Wigmore's formula is of more interest. Alone of the three it carries forward the philosophical conception of the Historical School and shows the influence of the Social-Philosophical School. Probably this formula marks the end of one period and the beginning of a new one in Anglo-American definitions of law. But while it recognizes the idea of sanction it assigns thereto a very subordinate place. And it is hardly an accident that a formula of this type appears in America, where lawyers and especially law-teachers, insist upon the traditional element almost exclusively.⁸⁴

While the metaphysical and historical jurists carried forward one of the contending ideas in the juristic thought of the prior century, the other idea was taken up and developed by practical jurists in France and by analytical jurists in England. We may begin with the French for two reasons. In the first place, as we have seen, French juristic thinking had begun to run along imperative lines in the eighteenth century, owing to the modes of politi-

⁸³ *Ante*, note 71.

⁸⁴ Professor Wigmore did his first juristic work in analytical jurisprudence and, in achievement, is probably our leading analytical jurist. His later juristic work is historical, but along with recent historical jurists, he no doubt would adhere to one of the Social-Philosophical Schools, insisting upon its practical or sociological side.

cal thought in a period of absolute government. Secondly, France was the first country of Europe to reduce her whole law to legislative form. Consequently after 1804 the formulas of French lawyers are usually imperative. They define *droit* as an aggregate of *lois* which have an imperative basis, or else define *loi* only, and that from the imperative standpoint.⁸⁵ This describes

⁸⁵ "The civil law is, therefore, a rule of conduct upon a subject of common interest prescribed to all citizens by their lawful sovereign. It is the solemn declaration of the legislative power, by which it commands, under certain penalties or subject to certain rewards, what each citizen ought to do or not to do or to permit for the common good of society." Toullier *Droit Civil Français*, I, §14 (1808). "A law (*loi*) is a rule established by the authority which, according to the political constitution, has the power of commanding, or prohibiting, or of permitting throughout the State. A law truly and properly so-called, therefore, . . . is a rule sanctioned by the public power, a rule civilly and juridically obligatory. Law (*droit*) is the result, or better, the aggregate or totality of these rules." Demolombe, *Cours de code Napoléon*, I, §2 (1845)). "Law (*loi*) . . . is a rule established by a superior will in order to direct human actions. . . . The law (*droit*) . . . sometimes the rules of law (*lois*) seen in their aggregate, or more often the general result of their dispositions." Demante, *Cours analytique de code civil*, I, §§1-2 (1849). "What is law (*droit*)? It is the aggregate, or rather the resultant, of the dispositions of the laws (*lois*) to which man is subjected, with the power of following or of violating them. . . . Now these laws (*lois*) are rules of conduct established by a competent authority." Marcade, *Explication du code Napoléon*, 5 ed., I, §1 (1859). "One may say with Portalis that law (*la loi*) is a solemn declaration of the will of the sovereign upon an object of common interest." Laurent, *Principes du droit civil Français*, I, §2 (1869). "Obligatory rules of conduct, general and permanent, established for men by the temporal sovereign." Vareilles-Sommières, *Principes Fondamentaux de Droit*, 12 (1889). "Law (*droit*) is the aggregate of precepts or laws (*lois*) governing the conduct of man toward his fellows, the observance of which it is possible, and at the same time just and useful, to assure by way of external coercion." Baudry-Lacantinerie, *Précis du droit civil*, 10 ed., I, §1 (1908).

Note the effect of recent social-utilitarian and social-psychological ideas upon the last formula. The problem of why so much that is set as law fails to be law in action has received much attention from sociological jurists. See my papers on *The Scope and Purpose of Sociological Jurisprudence*, 25 *Harv. Law Rev.*, 140, 154, 489, 515. The author attempts to take this matter into account. He attempts to explain the failure of written law to become law in action by saying that the rule which so fails cannot be enforced or cannot be enforced justly and usefully and so is not enforced. With respect to this introduction of enforceability as an element in the idea of law, compare the second stage of the Anglo-American analytical formula, *infra*. The older analytical view would be that the

exactly what appeared to be in France after the codes. Later jurists perceived that the traditional element was playing a very large, if not a controlling part in the interpretation, development and application of the codes, and consequently in the actual law administered in the tribunals. Hence not only did eighteenth-century ideas persist,⁸⁶ but the ideas of the metaphysical and historical jurists found a place in practical French treatises,⁸⁷ and ultimately there was a revival of philosophical jurisprudence.⁸⁸ Nevertheless the traditional element was obscured for a long time by the form of French law.

While German jurists were gradually coming back to the imperative idea, English jurists were engaged in getting away from it. The century from Blackstone to the Judicature Act was one of legislation. The growing-point of our law has been shifting slowly but surely to legislation for a long time. Nevertheless the dominant element is still case law, and common-law legislation is still a mere outline, to be filled in by a judicial gloss.⁸⁹ In consequence, legislation was so active in the nineteenth century that English jurists could not overlook the imperative element and yet the other element was too conspicuous to make it possible for an exclusively imperative theory to remain current. It would seem that parliamentary sovereignty in England turned the scale and brought it about that almost all English jurists adhered in varying degrees to the Analytical School, while American jurists in the second half of the nineteenth century were mostly of the Historical School because of the judicial power over unconstitutional legislation in this country and the resulting supremacy of the traditional element.

rule is law because it is the command of the sovereign and that the jurist has nothing to do with the question how far it is put into action. If it is not enforced it would be said the administrative machinery is at fault. Obviously the Social-Philosophical and Sociological Schools have compelled the analytical jurist to broaden his outlook.

⁸⁶ *E. g.* Mourlan, *Répétitions écrites sur le premier examen de code Napoléon*, 8 ed., I, §§2-4 (1869).

⁸⁷ *E. g.* Huc, *Commentaire du code civil*, I, §§1-10 (1892), seeking to deduce a complete system of principles of law from the idea of equality.

⁸⁸ See my paper, *The Scope and Purpose of Sociological Jurisprudence*, 25 *Harv. Law Rev.*, 140, 159.

⁸⁹ See my paper, *Common Law and Legislation*, 21 *Harv. Law Rev.*, 383.

At the beginning of the legislative reform movement in English law, we find Bentham, the founder of the science of legislation, saying, in a treatise on the principles of legislation, that "a law is either a command or the revocation of one."⁹⁰ His disciple, Austin, writing when the legislative reform movement was in full career and was producing all manner of artificial changes in the law, so that such parts of the law as remained in their original condition did so, as it were, by the grace of Parliament, worked out this idea vigorously in all its consequences and founded his system upon it. The general and almost blind adherence to Austin's doctrines at one time and the scarcely less general and perhaps at times little less blind repudiation which came as a reaction, have obscured his true position in the history of jurisprudence. In many respects he marks the end of a period rather than a starting-point. But the exactness and severity with which he summed up and restated what had long been the English theory of law⁹¹ made an issue on which the Historical School could and did join. Blackstone had said already that law was a "rule of action dictated by some superior and which the inferior is bound to obey"; likewise that it was "a rule of action dictated by some superior being."⁹² But along with these statements Blackstone, as we have seen, laid down with no apparent thought of inconsistency, the most extreme doctrines of natural law. Austin saw the inconsistency and was never weary of pointing it out. Having to choose between the two ideas, in view of the condition of English law at the time, Austin naturally inclined to the imperative theory, and laid down its general principles almost in the very words of Blackstone. A law, in the most general sense, is, he says, "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."⁹³ Jurisprudence, he says, has to do with rules set by men to men, provided they are established by determinate political superiors.⁹⁴ He requires a state as a condition of positive law; for a law, being a command, must proceed from a definite source and must be sanctioned.⁹⁵ Accordingly he defines positive law as "the aggregate of rules

⁹⁰ Principles of Morals and Legislation, 330 (1789).

⁹¹ See Hobbes' definition, *ante*, note 53.

⁹² Commentaries, I, 38, 39.

⁹³ Jurisprudence, 3 ed., 88.

⁹⁴ *Ibid.*, 89.

⁹⁵ *Ibid.*, 90-94.

set by men as politically superior to men as politically subject."⁹⁶ This is simply a thorough carrying out of the notion we have traced from the beginnings of jurisprudence in the writings of jurists living in periods of legislative activity. Its defects are now well understood. Not only does it fail when applied to the law of archaic communities, but it requires an over-ingenuous theory of implied command to account for the large traditional or customary element still to be found in developed systems. Nevertheless it must be admitted to represent what law is largely coming to be, especially where the common law itself is in force by the express terms of a statute.⁹⁷ The point most directly vulnerable is the notion that rules of law must be prescribed or *set* by the sovereign. We may understand such a doctrine when we find it still put forward by one who believes that rules of morals are to be taken from a spiritual sovereign and rules of law from a temporal sovereign.⁹⁸ We may expect to find it still asserted by those who cling to eighteenth-century dogmas and refer the source of all things to some agreement or consent on the part of the "people."⁹⁹ But to one who investigates the actual facts of existing systems it is impossible. The will of the State, or, if one likes, the will of the people is not always expressed in imperative form. The State may be passive. It may suffer old practices to continue or may continue to protect or require them, without any express declaration on the subject. Rules of law are administered by the courts, and the courts have been established by the State. This does not mean, however, that the State has established or prescribed the rules.

⁹⁶ *Ibid.*, 98.

⁹⁷ See for instance, Ala. Code 1907, §12; Ark. Kirby's Dig. 1904, §§23, 624; Cal. Gen. Laws 1904, Act 631; Col. Rev. St. 1908, §6295; Fla. Gen. St. 1906, §59; Ga. Rev. Code 1911, §1; Ind. Burns' Rev. St. §236; Md. Bill of Rights, Art. 5; Mo. Rev. St. 1909, §8047; Mont. Rev. Codes 1907, §6213; Neb. Comp. St. chap. 15 a; Nev. Comp. L., §3095; N. Y. Const. Art. I, §16; N. C. Pell's Rev. St. §2258; S. D. Civil Code, §6; Tex. Sayles' Civ. St. §2258; Utah, Comp. L. 1910, §2488; Vt. Pub. St. 1906, §1221; Va. Const. Schedule, §1; Wash. Rem. & Bal. Ann. Codes 1910, §143; W. Va. Const. Art. VII, §21; Wis. Const. Art. XIV, §13; Wyo. Comp. St. 1910, §3588. Cf. Jenks, Law and Politics in the Middle Ages, 2; Rattigan, Jurisprudence, §2; Brissaud, Manuel d'histoire du droit Français, 21; Stephen, Digest of the Criminal Law, xi.

⁹⁸ Vareilles-Sommières, Principes fondamentaux de droit, 12.

⁹⁹ Andrews, American Law, §72. See *ante*, note 10.

These considerations must have led in time to an overhauling of Austin's theories had nothing happened to bring them suddenly in question. But contact of English lawyers with a living body of archaic law in India gave England a Historical School of jurists and hastened the result. Hence Holland (1880) made a distinct advance in substituting the idea of enforcement by the sovereign.¹⁰⁰ The next improvement was to limit the formula to those rules enforced in the administration of justice.¹⁰¹ Finally, we owe to Salmond a suggestion which serves tersely to reconcile the analysis of modern systems with the facts of legal history. He defines law as "the rules *recognized* and acted on in courts of justice."¹⁰² If we substitute *or for and*, we have a formula which accords also with the circumstances of archaic law, since before the rise of the State as the active agent in putting down private war, law is something *recognized* in the administration of justice; and it continues to be merely recognized until the State becomes strong enough to take it up and *enforce* it. International law to-day is a system recognized by states. We may hardly say that its rules for the government of the relations of states with each other are enforced. In this connection, the ideas of the Historical School are much nearer the truth. The rules of international law are practised rather than enforced. In other words, an imperative theory which may be made to fit the civil law of modern states will not fit international law.

Thus it will be seen that the Anglo-American analytical formula has gone through three stages. In the first stage, the imperative

¹⁰⁰ "A general rule of external human action enforced by a sovereign political authority." Jurisprudence, chap. 3.

¹⁰¹ "The law of every country . . . consists of all the principles, rules or maxims enforced by the courts of that country as being supported by the authority of the State." Dicey, Private International Law as a Branch of the Law of England, 6 Law Quart. Rev., 3 (1890). "The law or laws of a society are the rules in accordance with which the courts of that society determine cases, and by which, therefore, the members of that society are to govern themselves; and the circumstance which distinguishes these rules from other rules for conduct, and which makes them the law, is the fact that courts do act upon them." Gray, Definitions and Questions in Jurisprudence, 6 Harv. Law Rev., 24 (1892). "The sum of the rules administered by courts of justice." Pollock and Maitland, History of English Law, Introduction (1895).

¹⁰² Jurisprudence, §5 (1902). Compare his earlier statement: "The aggregate of principles or rules recognized or acted on by the State in the administration of justice." First Principles of Jurisprudence, 77 (1893).

theory was perfected and conflicting eighteenth-century ideas were eliminated.¹⁰³ In the second stage, through the influence of the Historical School, enforcement by the State was substituted for enactment as the significant mark of law.¹⁰⁴ In the third stage, enforcement by tribunals was substituted for enforcement by the State.

A noteworthy feature of the formulas in what has been called the third stage of the Anglo-American analytical theory, is the insistence upon enforcement by the courts; insistence that the courts are the real makers of the law.¹⁰⁵ This insistence upon the rôle played by the court in determining what is law would be impossible except under the Anglo-American legal system, where our doctrine of case law and precedent make the court the all-important force in law-making. We say a rule is law because the courts enforce it. Continental Europe has been wont to say the courts enforce the rule because it is law. Obviously a

¹⁰³ In addition to Austin's definition, *supra*, see the following which represent the first stage: "A command proceeding from the supreme political authority of a State and addressed to the persons who are the subjects of that authority." Amos, *Science of Law*, 48 (1874). "The general body of rules which are addressed by the rulers of the political society to the members of that society, and which are generally obeyed." Markby, *Elements of Law*, §9 (1871). "A law is a command; that is to say it is the signification by a law-giver to a person obnoxious to evil of the law-giver's wish that such person should do or forbear to do some act, with an intimation of an evil that will be inflicted in case the wish be disregarded." Poste, *Gaius*, 2 (1871).

¹⁰⁴ "Rules of conduct defined by the State as those which it will enforce, for the enforcement of which it employs a uniform constraint." Anson, *Law and Custom of the Constitution*, I, 8 (1886). "The sum of the rules of justice administered in a State and by its authority." Pollock, *First Book of Jurisprudence*, 17 (1896). "The aggregate of rules administered mediately or immediately by the State's supreme authority, or regulating the constitution and functions of that supreme authority itself; the ultimate sanction being in both cases disapproval by the bulk of the members of that State." Clark, *Practical Jurisprudence*, 172 (1883).

¹⁰⁵ This has been stated in its extreme form by Professor Gray: "And this is the reason why legislative acts, statutes, are to be dealt with as sources of law, and not as part of the law itself, why they are to be co-ordinated with the other sources which I have mentioned. It has been sometimes said that the law is composed of two parts,—legislative law and judge-made law, but in truth all the law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts." Gray, *Nature and Sources of Law*, §276.

great deal depends upon whether the courts and the legal profession are trained in the one view or the other. Our courts assume a freedom which Continental courts do not. Hence a theory which may seem to us the only correct theory is quite incomprehensible to Continental jurists. Perhaps nothing could make more clear the extent to which juristic theory with respect to the nature of law depends upon the legal system which the particular jurist sees before him.

Theories of Law Since Jhering.

More recently the shifting of the growing-point of German law to legislation has made itself felt in jurisprudence in a renewed insistence upon the imperative element in German definitions of law. As has been said, Jhering was the leader in this movement.¹⁰⁶ He made the needed corrections in the older imperative theory and brought together the philosophical and the analytical conceptions as Savigny had reconciled the philosophical and the historical conceptions.¹⁰⁷ After Jhering the imperative element came to be quite as marked in German formulas as in French and English formulas.¹⁰⁸ Indeed the situation in Germany since the new code is quite the same as that in France after 1804.

¹⁰⁶ Jhering insisted particularly upon sanction. "A legal proposition without legal compulsion behind it is a contradiction in itself; a fire that burns not, a light that shines not." *Zweck im Recht*, 3 ed., I, 322 (1877).

¹⁰⁷ Jhering's formula is: "The sum of the rules of constraint which obtain in a State." *Zweck im Recht*, 3 ed., I, 320.

¹⁰⁸ "The purpose of all law is a determinate external behavior of men toward men. The means of attaining this purpose, wherein alone the law consists, are nomes or imperatives." Bierling, *Juristische Prinzipienlehre*, I, §3. "But one must bear in mind that the final basis of all law lies in the power of the State. . . . Enacted law and customary law are to be carried back to this same power, the one as expressed, the other as tacit will thereof." Czyhlarz, *Institutionen*, §4. See Thon, *Rechtsnorm und subjektives Recht*, §§1-3 (1878). Thon says: "The whole law of a community is nothing but a complex of imperatives."

Compare also the insistence upon sanction, in one way or another, in recent German definitions. "The rule armed with force first gives us the conception of law. That which does not possess the guarantee lying in force cannot be called law." Lasson, *System der Rechtsphilosophie*, 207 (1882). "Law is the ordering of the relations of life guaranteed by the general will." Dernburg, *Das bürgerliche Recht des Deutschen Reichs und Preussens*, I, §16 (1902). "Law is the ordering (*Ordnung*) based upon autonomous government in a state of civilization." Berolzheimer, *System der Rechts und Wirtschaftsphilosophie*, III, §17 (1906).

Thus it appears that the growth of legislation as the chief agency in formulating the law has led to an emphasizing of the imperative element in all recent definitions. In England, as the Analytical School arose while the legislative energy of the reform movement was at its height and the Historical School came later, jurists have been tempering ultra-imperative analytical formulas to bring them into accord with the results of historical research. In America, we have been tempering them so as to bring them into better accord with the obvious rôle of the courts in the making of our law. In Germany, where the Historical School came earlier and waged its war with philosophical rather than with analytical antagonists, metaphysical formulas have had to be made over to accord with the everyday experience of those who live under the jurisdiction of active legislatures. For the moment, the conception of the Analytical School is almost as thoroughly established as was once the idea of a law of nature and later the theory of the Historical School. As the "capital fact in the mechanism of modern law is the energy of legislatures,"¹⁰⁹ we may expect that jurists will insist more and more upon the imperative side of law. Even writers on ethics have been influenced by this modern predominance of enacted law.¹¹⁰ In Italy alone did the theory of natural law continue to flourish despite a code.¹¹¹ But, as we have seen, in the history of jurisprudence periods of legislation and codification, in which the imperative theory of law has been current, have always been periods of stagnation. The law has lived and grown through juristic activity under the influence of ideas of natural right and justice or of reasonableness, not force and not sovereign will, as the ultimate source of authority. Hence, if there were no counter movement visible, we might well regard the well-marked swing of the pendulum toward the imperative side of the law in juristic theory as an ill omen.

Here the Sociological School has an opportunity. Realizing that a final answer to the question, what is law? is impossible,

¹⁰⁹ Maine, *Early History of Institutions*, Lect. XIII.

¹¹⁰ "We must define laws to be rules of conduct laid down by a rightful authority, commanding within the limits of their authority." Sidgwick, *Methods of Ethics*, 6 ed., 296.

¹¹¹ Lioy, *Philosophy of Right*, (Hastie's transl.) II, 379-392. But a decadence was remarked at the end of the nineteenth century. Carle, *Vita del diritto*, 2 ed., §204 (1890).

since the thing to be defined is living and growing and therefore subject to change, the most conspicuous representative of the Social-Philosophical School abandons that question and goes behind it to define the legal order (*Rechtsordnung*) in which law results and for which it exists.¹¹² The means of attaining this legal order, or, as we should put it, the means of administering justice, may vary. The agencies which determine the content of the body of principles by which it is regulated may be this or that. They may be command and sovereign will or reason and juristic science, or custom and tradition. But the end has been before men from the beginning of legal evolution. By appealing from the particular form of law which is now current to the ultimate conception of the legal order, the new school points out the road for future development in jurisprudence. It keeps before us that law is not an end but a means. A school which studies it as a social mechanism¹¹³ will do no little service if it but deliver us from the condition of dry rot which juristic thought has hitherto contracted in periods of enactment and codification, and preserve or restore the juristic ideals of reason and justice, which for a time we seemed fated to lose or to forget.

The Relation of Theories of Law to the Problem of Rule and Discretion.

Comparison of the development of juristic theory of law with the development of the forms of law and study of juristic theory of law in connection with the formulating agencies in law for the time being, show that there is no one absolute form of law or absolute type of law-making, but that the traditional and the imperative elements in law, the juristic and the political agencies in law-making may each find a place, greater or less according to the circumstances of time and country. Moreover a recognition that reason and juristic science on the one hand and command and sovereign will on the other hand are but means toward the discovery and formulation of principles for the administration of justice leads to the conclusion that the end deserves our study quite as much as the means and that the means are to be studied

¹¹² "The legal order is an adjustment through coercion of the relations of human life arising in a social manner from the social nature of man." Kohler, *Einführung in die Rechtswissenschaft*, §1 (1902).

¹¹³ "A mechanism in the service of the good." Paulsen, *Ethics* (Thilly's transl.) 627.

chiefly with reference to the manner and extent of their achieving the end. Thus the result of the long conflict in juristic theory between the idea of reason and the idea of authority suggests that we must dig deeper than the jurists who have gone before and must, as the social-philosophical jurists have begun to do, consider law with reference to its end and with reference to its results in the direction of that end, and not merely in and of itself. This insistence upon the legal or jural order rather than upon law, in which juristic theory of law has culminated, has a special importance for American political and juristic thinking.

In America a new conflict has arisen, analogous to the conflict in eighteenth-century juristic thought, and brought about by a like cause. Our classical juristic theory and our classical political theory are wholly out of accord. And while our law books go on laying down both,¹¹⁴ as naively unconscious of their inconsistency as was Blackstone in laying down side by side Coke's theory of the sovereignty of Parliament and the Grotian theory of natural law, in practice lawyers adhere tenaciously to the one¹¹⁵ while laymen assume the other almost as a matter of course.¹¹⁶ For the popular theory of sovereignty, what one may call the classical American political theory, is quite as firmly rooted in the lay mind as the eighteenth-century theory of a fundamental law of eternal and absolute validity is rooted in the legal mind. The layman is taught this political theory in school, he reads it in the newspapers, he listens to it on the Fourth of July and from Chautauqua platforms and he seldom or never hears it questioned. In consequence he is as thoroughly sure of it as is the lawyer of his juristic theory. This conflict between the legal and the political theory of law-making between the professional and the popular theory of law, is a prime cause of misunderstanding of courts and of popular agitation against judges and lawyers. For if the lawyer is moved to stigmatize all that does not comport with his

¹¹⁴ Robinson, *Elementary Law*, §1; Robinson, *Elements of American Jurisprudence*, §§1-8; Fishback, *Elementary Law*, §§2, 6, 7, 9; Andrews, *American Law*, chaps. I, VI-VIII, X; Smith, *Elementary Law*, §§1-8, 16-19.

¹¹⁵ In addition to the many examples in 4, note 13, compare: "In other words, the reason must exist antecedently to the law and the law is but the sanction of society added to the inherent force of the reason." E. V. Abbott, in 10 *Harv. Law Rev.*, 219.

¹¹⁶ Willoughby, *Nature of the State*, 199-204; Woodrow Wilson, *The State*, 1457; Leacock, *Elements of Political Science*, 100-104.

doctrine as lawlessness, the people at large are moved to stigmatize all that does not comport with their theory as usurpation.

While the American lawyer, as a rule, still believes that the principles of law are absolute, eternal, and of universal validity, and the common law teaches that principles of decision must be found, **not made**, the people believe no less firmly that law may be made, and that they have the power to make it. While to the lawyer the State enforces law because it is law, to the people law is law because the State, reflecting their desires, has so willed. While to the lawyer law is above and beyond all will, to the people it is but a formulation of the general will. Hence it often happens that when the lawyer thinks he is enforcing the law, the people think he is overturning the law. While, for example, the lawyer thinks of popular action through the State as subject to legal limitations running back of all Constitutions, and merely reasserted, not created, thereby, the people think of themselves as the authors of all Constitutions and limitations, and the final judges of their meaning and effect. This conflict between the lawyer's theory, as he gets it from the eighteenth century, and the political theory, likewise of eighteenth-century origin, becomes most acute with respect to the common-law doctrine of supremacy of law. But it leads also to conflict over the relation of common law to legislation.¹¹⁷ Both of these absolute theories must be abandoned. There is truth in each in that each describes an element in all legal systems which the other has never been able to put down, although each in turn has been able more than once to push the other into the background for the time being. As jurists recognize this and instead of attempting to establish the one or the other as the necessary ultimate source of all law or of all authority of legal rules, seek rather to work out the relation of each to the end of law, we may expect much of the friction between courts and people in America to abate.

But there is a side to the conflict between reason and authority in juristic theory which is not so easily disposed of. For this conflict is closely related to the fundamental problem of rule and discretion, the problem of administration of justice by law and administration of justice by magistrates. The new attitude toward theories of law must lead us to work out the exact rela-

¹¹⁷ See my papers, *The Law and the People*, University of Chicago Magazine, III, 1 (1910); *Democracy and the Common Law*, Case and Comment, XVIII, 447 (1912).

tion of the traditional element of law and the imperative element, of judicial empiricism and conscious law-making, of reason and science on the one hand and of command and will on the other hand, to this problem. For the real problem is here. Juristic discussion of the nature of law has come to be futile, except as a guide to the legal ideas of the time, because it has failed to connect the question, what is law? and the controversy as to common law and legislation, with the equally old problem of law and morals, the distinction of law and equity, the discussion of the province of court and jury, the controversy as to fixed rule or wide discretion in procedure, the movement for individualization of punishment and the Continental controversy over application of legal rules, as in large measure a part, along with them, of the larger problem of rule and of discretion in the administration of justice. That problem is too large to be discussed here. It is enough to suggest that inheritance and succession, interests in property and the conveyance thereof, and matters of commercial law, where the creation, incidents and transfer of obligations with respect to which the social interest in security of transactions is especially strong, have proved at all times a fruitful field for effective legislation. But where the questions are not of interests of substance, but of the weighing of human conduct and passing upon its moral aspects, legislation has accomplished little. No codification of the law of torts has achieved any measure of success. Indeed modern codes are content with significantly broad generalizations.¹¹⁸ In the United States, succession is everywhere a matter of statute, and no one questions that the statutes operate well. More and more our commercial law is codifying, and our law of property, with respect to which in a modern community, certainty is an imperative requirement, will no doubt afford a like opportunity for uniform legislation. On the other hand, in those parts of the law where we have to do more than delimit interests of substance ¹¹⁹ and devise means of securing them, not only do

¹¹⁸ See French Civil Code, art. 1382; German Civil Code, 823, 826. It is not an accident that the Anglo-American law of torts has completely established itself in Louisiana or that jurisprudence—*i. e.* judge-made law—has more weight here than anywhere else in French law.

¹¹⁹ The influence of the nineteenth-century insistence upon property may be seen in Korkunov's definition of law as the delimitation of interests. *General Theory of Law* (Hastings' transl.), 6. Probably the exaggerated insistence upon property in Anglo-American juristic thinking is reflected in some measure in the English preference for the imperative theory of law.

we meet with little legislation¹²⁰ and that confined to generalizations of doubtful practical value, but in the administration of our traditional judge-made or jurist-made law we find ourselves compelled to leave a wide margin of discretion, as for example in the standard of the reasonable man¹²¹ in our law of negligence and the standard of the *bonus ac diligens paterfamilias* applied by the Roman law and especially by the modern Roman law to so many questions of *culpa* where the question is really one of good faith; and all attempts to cut down this margin by hard and fast rules prove futile. Obviously the more flexible traditional element, with its greater power of adjustment and capacity for more rapid growth, may best deal with this part of the law, which inherently does not admit of complete justice by application of fixed rules. Here the trained reason and disciplined judgment of the judge are our assurance that causes will be decided on principles of reason and not according to the chance dictates of caprice. Here, consequently, reason and juristic science must coöperate with judicial experience in discovering and defining the general standards which are to be applied liberally according to the circumstances of each case. In the other part of the law, where human conduct is not involved directly, and where fixed rules for the exact delimitation of interests are the prime requisite, the will of the State, declared authoritatively in advance, conduces to the end of law and has always proved an effective and desirable form of law.

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¹²⁰ For example, the Anglo-Indian codes leave the law of torts untouched. Note also that the common law insists upon its doctrine of *stare decisis* chiefly in the two cases of property and commercial law. *Lindsay v. Lindsay*, 47 Ind., 283; *Aud v. Magruder*, 10 Cal., 282; Black, *Law of Judicial Precedents*, §79, 76, p. 242.

¹²¹ As has often been pointed out, this is not a *legal* standard at all. Holmes, *Common Law*, 110-111; Bigelow, *Torts*, 673.